

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District of Massachusetts
Name William R. Mitchell	Prisoner No. W-51474	Case No. 2
Place of Confinement Norfolk State Prison, P.O. Box 43, Norfolk, MA 02056		
Name of Petitioner (include name under which convicted) William R. Mitchell		Name of Respondent (authorized person having custody of petitioner) V. Luis Spencer/Superintendent of Norfolk
The Attorney General of the State of: Massachusetts, Thomas F. Reilly		

PETITION

1. Name and location of court which entered the judgment of conviction under attack Essex Superior Court,
34 Federal Street, Salem, MA 01970

2. Date of judgment of conviction November 14, 1991

3. Length of sentence Life Sentence

4. Nature of offense involved (all counts) Second Degree Murder (One Count)

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

None

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

- (a) Name of court Appeals Court for Massachusetts
- (b) Result Conviction affirmed
- (c) Date of result and citation, if known March, 1995/ 38 Mass.App.Ct. 184 (1995)
- (d) Grounds raised Prosecutorial misconduct; abuse of discretion/improper jury instruction; other bad acts/witness testimony; flawed jury instructions on manslaughter and provocation.
- (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
- (1) Name of court Supreme Judicial Court for Massachusetts
- (2) Result Conviction affirmed
- (3) Date of result and citation, if known April 24, 1995/ 420 Mass. 1101 (1995)
- (4) Grounds raised Denial of motion for a mistrial; fingerprints and DNA contamination; Prosecutorial Misconduct and effective assistance of counsel.
- (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
- (1) Name of court None
- (2) Result None
- (3) Date of result and citation, if known None
- (4) Grounds raised None

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court Essex Superior Court
- (2) Nature of proceeding Motion for a new trial and amended motion for a new trial and other related motions.
- (3) Grounds raised Prosecutorial Misconduct/use of false and perjured testimony (Two Counts)/improperly vouched for credibility of his witnesses;

AO 241 (Rev. 5/85)

Defendant did not waive his right to testify in his own defense where defendant was prescribed medication by the Commonwealth; Trial counsel's ineffective assistance of counsel for failure to impeach to witnesses/failure to obtain a vital witness and failure to obtain a material witness; appellate counsel/ineffective assistance of counsel(Two Counts).

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Motions denied

(6) Date of result July 2, 1998

(b) As to any second petition, application or motion give the same information:

(1) Name of court Essex Superior Court

(2) Nature of proceeding Motion for a new trial/September 18, 2000

(3) Grounds raised Flawed Jury Instruction/Manslaughter and provocation; evidence warranted instructions and the instructions were conflicting without corrective language.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result Motion Denied.

(6) Date of result August 7, 2001

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☒ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

See above at "c".

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: Erroneous Manslaughter Instruction (Provocation).
Evidence Warranting Instruction and Conflicting language/confusion to the jury.

Supporting FACTS (state briefly without citing cases or law) The Essex Superior Court delivered an erroneous manslaughter instruction that was considered unconstitutional after defendant's trial denied defendant due process.

After an earlier incident during the day of April 25, 1990, on or around 11:00 p.m. four to five men came to defendant's home and attacked him at the doorway, and as a result, someone got stabbed and died. The defendant was arrested for murder, but was indicted on second degree murder on May, 1990. The State Court

delivered an erroneous manslaughter instruction pertaining to provocation and manslaughter which relieved the Commonwealth of there burden of proof beyond a reasonable doubt in violation of the State and Federal Constitution.

- B. Ground two: (i) The prosecutor engaged in prejudicial misconduct when he "knowingly" used false and perjured testimony as to Two of his witnesses; Misrepresented the defendant's criminal record that never existed; Improper vouching of Commonwealth's witnesses.

Supporting FACTS (state briefly without citing cases or law) (i) The prosecutor presented two witnesses who both claimed and denied that the Commonwealth promised them a reward, deal, or acquittal of prior charges in exchange for their testimony, and the Commonwealth knowingly knew that his witnesses were lying as to the promise, rewards or deal. The prosecutor obtained a ruling from the judge so he could use one of defendant's prior convictions, which were suppressed in the event defendant testified, but used this prior conviction through one of the Commonwealth's witnesses to rehabilitate his witness about a prior stabbing. The prosecutor improperly vouched for one of his key witnesses in closing arguments, when he argued that his witness has nothing to lie about and he tells you he sees everything that

-5a-

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B. Ground Two:

(ii) The defendant did not knowingly and intelligently waive his rights to testify on his own behalf in violation of the State and Federal Constitution.

(iii) Trial counsel rendered ineffective assistance of counsel in violation of the State and Federal Constitution, when he failed to impeach Two of the Commonwealth's key witnesses; and his failure to prepare and present Two crucial defense witnesses.

(iv) Appellate counsel rendered ineffective assistance of counsel when he failed to raise on direct appeal issues (i)-(iii), and his failure to raise an "other bad acts" argument in violation of the State and Federal Constitution.

Statement of Facts:

B. Ground Two:

...happened between the victim and the defendant.

(ii) The defendant did not knowingly and intelligently waive his right to testify because trial counsel never discussed the details as to what he could expect and how it would effect his defense. Furthermore, counsel "knew" that defendant was being treated for depression and stress, and he also "knew" that defendant was prescribed medication right up to the day of trial and his conviction. As a result, defendant could not make an informed decision as to whether or not he was going to testify.

(iii) Trial counsel failed to impeach two of the Commonwealth's witnesses when one witness, John Koney, changed his story two times and gave a third story at trial. On redirect-examination, Koney was allowed to rehabilitate his testimony, and tell the jury that three months prior to this case defendant had stabbed him in an earlier altercation, and that defendant threaten him with a hammer and claiming that he (Koney) should not have put the defendant in jail for 41 days. The defendant was never convicted for this crime against Koney, and the admission of this testimony prejudiced the defendant. Counsel never obtained his criminal records from this case in order to impeach Koney.

Trial counsel failed to impeach Mr. True with records that existed at the time of trial that Mr. True did have a charge of assault by means of a dangerous weapon dismissed by the Commonwealth without prejudiced, therefore, Mr. True claimed that the Commonwealth never granted him a deal, or reward and/or promise for his truthful and honest testimony. Counsel failed to impeach True with these records.

-5b-

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Statement of Facts:
B. Ground Two:

Trial counsel failed to obtain a crucial witness, Penny Tardif. Ms. Tardif lived across the hall from defendant, and she had personal knowledge of the chain of events that occurred the night of the incident, April 25, 1990. Ms. Tardif gave Salisbury Police a official statement (Police Report) that she let the victim and at least five of his friends into her apartment, and she asked the victim what do you want, and he said I am going to kick ass. The victim asked for a knife and she gave him a butter knife, and she witnessed the victim pick the door to defendant's apartment and then she heard a lot of commotion in the hallway, and said that the victim said call the cops, and she said that she did not have one.

Trial counsel also failed to obtain a crucial witness, James Barnes, Ms. Tardif's boyfriend. He gave Salisbury Police a statement of what happened the night of the incident. He told police that the victim and three of his friends came in through Ms. Tardif's porch door and the second floor, they all went to the defendant's apartment, but came back and asked for a knife. They all went back to the defendant's apartment, which was right across the hall. Both potential witnesses harbored exculpatory evidence and could have effected the outcome of the proceedings.

(iv) Appellate counsel failed to raise on direct appeal these issues and he also failed to present an other bad acts argument. Appellate counsel could have, but did not obtain the defendant's criminal records from the prior stabbing with John Koney, and presented an other bad acts argument.

AO 241 (Rev. 5/85)

C. Ground three: The prosecution team violated defendant's rights to due process of law and effective assistance of counsel by improperly contaminating a crucial bloodstain on the knife used to kill the victim, thereby, thwarting defense efforts to type that blood, and misleading counsel as to the results. Prosecutor argued this in closing arguments.
 Supporting FACTS (state briefly without citing cases or law):
 (i) The prosecutor violated a pretrial conference report or agreement as to sending the knife to the FBI for DNA testing. The prosecutor never sent the knife as agreed, but sent a swab from the knife to be tested, and the expert for the Commonwealth did not know what end of the knife the sample came from, thereby, requiring a mistrial. (ii) The fingerprint testing on the knife handle by use of a super glue method, made conventional blood typing tests on the bloodstain on the handle impossible. The fingerprints were destroyed as a result. (iii) Defense counsel relied on the fundamental misunderstanding of the forensic evidence resulted directly from the prosecutor's failure to have the knife, or both blood samples on it, tested as promised. This made the FBI report misleading to the defense, and amounted to governmental interference.

Ground four:
 The judge improperly instructed the jury to consider one of the Commonwealth's witnesses, Sean Riley's grand jury testimony, which directly contradicted his trial testimony, for impeachment purposes only.
 Supporting FACTS (state briefly without citing cases or law):

Defense counsel offered Sean Riley's grand jury testimony on the vital issue of ~~whether the victim and his companions had attempted to force the front door of the apartment the defendant was in, as the defense alleged, or had been let in, as the Commonwealth alleges.~~ The judge improperly limited the jury's consideration of this evidence to the issue of ~~the witness's credibility.~~ Riley's grand jury testimony directly contradicts his trial testimony, and it should have been allowed for its full probative value.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

All were presented in the State Court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
 Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Frank Marchetti for trial.

(b) At arraignment and plea Frank marchetti

-6a-

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C. Ground Three:

(iv) The prosecutor utilized the test results in his closing arguments. The prosecutor told the jury that the blood on the knife handle was defendant's, and there was no report stating that. This was grossly improper.

-6b-

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E. Ground Five:

The testimony by the Commonwealth's witness, John Koney, that the defendant had stabbed him, been jailed as a result, and terrorized him and his family upon defendant's release, and it was offered to explain Koney's three false statements to police, and finally, his last-minute claim to be an eye-witness to the whole killing was more prejudicial than probative.

Statement of Facts:

E. Ground Five:

(i) The Commonwealth's admission of defendant's prior bad acts denied him a fair trial, and gave the jury a bad impression of defendant as one who will fight at a drop of a hat, and that he is combatant. Mr. Koney neatly dovetailed with the Commonwealth's case or theory that defendant attacked the victim without provocation, in the hall outside the apartment. Koney had never given this account to anyone until five days before trial, when he related it to the prosecutor. Furthermore, Koney testified that, three months before the killing, the defendant stabbed him with a knife after Koney and his brother went to the defendant's apartment to intervene in a fight between the defendant and one of Koney's friends. Koney was allowed to recount the events in some detail. Koney quoted the defendant as telling Koney that he shouldn't have put him in jail for the forty-one days, and saying as he pounded on the cabinets with a hammer, I'll show you some power. The stabbing event was irrelevant because Koney said he was personally unafraid of defendant and concerned only about his family's welfare.

F. Ground Six:

Fundamental flaws in the jury instructions, all ignored by defense counsel deprived defendant of otherwise available, viable defense to murder.

Statement of Facts:

F. Ground Six:

(i) The judge defined murder as an unlawful killing, with malice-aforethought. He said that a killing in self-defense negates the elements of unlawfulness; but not that self-defense negates malice aforethought also. The judge further instructed that the reasonableness of the force used in self-defense distinguishes murder from manslaughter. The judge offered no guidance on how to determine whether the victim was "unlawfully" in the apartment, or with respect to what point in time they should make that determination. The judge also told the jury that

-6c-

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Statement of Facts:
F. Ground Six:

in evaluating the defendant's fear of attack, the jurors were emphatically told to consider the threat posed by the victim alone.

(ii) In defining malice, the judge defined the three prongs of malice and erroneously told the jury, both initially and in supplementary instructions that voluntary intoxication could be considered in connection with the two involving specific intent, but not with the one involving general intent.

(iii) Regarding voluntary manslaughter, the judge erroneously told the jurors that provocation, sudden combat and excessive force are elements to be proven beyond a reasonable doubt by the prosecution. He emphasized that these elements had to be affirmatively established by the prosecution to justify a voluntary manslaughter conviction.

(iv) The judge failed to define the critical nexus between self-defense and malice aforethought, and because self-defense was a contested issue, the defendant was constitutionally entitled to instructions which clearly assigned the burden of proving beyond a reasonable doubt each fact necessary to constitute the crime with which he is charged to the Commonwealth. This includes instructions clearly informing the jury of the critical nexus between self-defense, provocation and sudden combat, on the one hand, and malice aforethought on the other; that is, malice aforethought and each of these defenses are mutually exclusive and cannot coexist. As to self-defense, the judge said that it negates the element of unlawfulness in murder. He also said the use of excessive force marked the distinction between manslaughter and murder. But he never told the jury that self-defense and malice are mutually exclusive. This was constitutional error.

(v) The judge improperly instructed the jury that only the victim's behavior was relevant to whether the defendant actually and reasonably believed he faced a threat of death or serious bodily injury. At the time of the incident, the victim and his five friends had come to the front door of the apartment building. They were pounding on walls to be let in the building. When they could not get in the front security doors, they went up a fire escape to the second floor porch. The victim was let in on the second floor he went down the stairs and let his friends in. The victim obtained a knife and picked the door to defendant's apartment with his friends standing with him in the hallway. Under these circumstances, it was improper for the judge to instruct that, in evaluating defendant's resort to deadly force, the jury could only

-6e-

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Statement of Facts:

F. Ground Six:

(ix) The flawed jury instructions deprived defendant of a substantial opportunity for a voluntary manslaughter verdict. The instructions misdefining voluntary manslaughter and requiring affirmative proof of mitigating circumstances allowed the jury to convict defendant of murder even if they held a reasonable doubt whether he had acted without provocation or in sudden combat, or used excessive force in defending himself. The instructions permitted simultaneous findings of malice and self-defense. The instructions on excessive force required that circumstances to be affirmatively proved to established manslaughter rather than requiring it to be disproved beyond a reasonable doubt to establish murder. These instructions created confusion with the jury because defendant could have been convicted of manslaughter instead of murder. Especially, if the jurors harbored a reasonable doubt that any of the mitigating circumstances existed, or that defendant acted in self-defense but used excessive force.

AO 241 (Rev. 5/85)

- (c) At trial Frank Marchetti (CPCS)
- (d) At sentencing Frank Marchetti
- (e) On appeal John Thompson (CPCS)
- (f) In any post-conviction proceeding First two motions were done pro-se.
The third motion for a new trial counsel were Jean M. Fielding and
Greg T. Schubert. (CPCS)
- (g) On appeal from any adverse ruling in a post-conviction proceeding Pro-se on the first two
motions, and Greg T. Schubert on appeal for the third motion for a
new trial.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
 Yes ☐ No ☒
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
 Yes ☐ No ☒
- (a) If so, give name and location of court which imposed sentence to be served in the future: _____
None
- (b) Give date and length of the above sentence: None
- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
 Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

None

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 21, 2004

(date)

William R. Mitchell
 Signature of Petitioner